



NATURAL RESOURCES DEFENSE COUNCIL

August 13, 2001

FAX: (202) 456-2710

Edward A. Boling
 Freedom of Information Officer
 Council on Environmental Quality
 Executive Office of the President
 Washington, DC 20003

Re: April 27, 2001, FOIA request regarding carbon dioxide and Kyoto Protocol

Dear Mr. Boling:

This is an appeal of the agency's response to the above-referenced Freedom of Information Act request, pursuant to 5 U.S.C. 552(a)(6).

On April 27, 2001, NRDC filed a FOIA request seeking agency records relating to carbon dioxide and the Kyoto Protocol. You responded on behalf of CEQ on July 26, 2001, by disclosing 26 files of responsive documents. Your letter also said that the agency was withholding 35 other files that you described as "pre-decisional documents and communications (total 292 pages) pursuant to 5 U.S.C. § 552(b)(5)." Your letter denied our request for sufficient information to describe the withheld documents. Finally, your letter granted our request for a waiver of fees.

We find it necessary to appeal your decision on two issues.

1. Failure to give a meaningful description of the documents withheld

First, your response has given us no basis for evaluating whether each of the 35 files and 292 pages that have been withheld is properly subject, in whole or in part, to exemption 5. Likewise, even if one or more of those records is properly subject to exemption 5, your response has given us no basis for evaluating whether release would still be in the public interest. In order to allow a reasonable opportunity to evaluate whether exemption 5 applies, whether factual portions of records can be released, or whether the exemption should be waived in the public interest, we request that CEQ provide us a listing of the withheld documents describing with reasonable specificity the author, subject matter, contents, length, and recipients of each one.

Your letter states that we are "not entitled to such a listing at the administrative stage of processing FOIA requests and appeals" and cites a case, *Judicial Watch v. Clinton*, 880 F.Supp. 1, 10 (D.D.C. 1995). This case, however, does not appear to support the proposition for which you have cited it. Rather, it says (at page 11, actually) that a *Vaughn* index may not be required in some cases if an agency has provided sufficient information to support its withholding decision by means of an agency official's affidavit. The case does not stand for the proposition that an agency satisfies its obligation by giving the FOIA requestor nothing more than a conclusory statement that a given number of records fall under exemption 5 and are being withheld.

Your position would give us no choice other than to go to court in order to evaluate whether exemption 5 properly applies to each record; whether any factual part of a record properly subject to the exemption should be segregated and disclosed; or whether disclosure of one or more exempt records would be in the public interest. We note that such a description of the documents will have to be prepared if this matter goes to litigation. Making this information available now would conserve the resources of both CEQ and NRDC by obviating the need for litigation over this procedural step.

2. Incompleteness of the agency's document search

Second, we are concerned that the agency's response to date may not be complete in that it may not include certain records encompassed by our April 27 request. Specifically, the records CEQ has disclosed do not include any correspondence or other records of communications between CEQ employees and non-federal employees that express *opposition* to action by the new administration to regulate carbon dioxide from electric power plants in the period before March 13, 2001. This is surprising for two reasons:

First, there have been press reports of numerous and intense communications between industry representatives and representatives of the new administration opposing legislation or regulation to limit carbon dioxide emissions from power plants and opposing further participation in the Kyoto Protocol, particularly (but not exclusively) in the period before March 13, 2001, the date on which the President wrote a letter to several senators reversing his campaign promise to regulate CO₂ emissions from power plants.

Second, the records *do* include at least two communications from non-federal employees expressing *support* for regulating CO₂ emissions from power plants. In addition, there are several documents from a group of power companies known the Clean Energy Group describing their proposal to regulate four power plant pollutants, including CO₂.

These circumstances make the absence of correspondence opposing CO₂ limitations or the Kyoto Protocol quite odd, to say the least. We therefore must request that CEQ make such further search of its records as is necessary to ensure that the agency has made available all such records. In the interest of minimizing the burden on CEQ, we

are prepared to narrow the request for a further search to focus on records of communications between agency employees and non-Federal employees that express opposition to CO₂ emissions limitations or opposition to the Kyoto Protocol. We request that the agency describe in detail the scope and method of its search so as to assure that all such records were found and made available.¹

This issue further underlines the need for a list giving a meaningful description of each of the records that has been withheld, as requested above. Without this information, it is not possible for us to determine whether the withheld records contain any correspondence from non-Federal employees opposing CO₂ limitations or the Kyoto Protocol, or records memorializing such communications. If such records are among the withheld documents, then invoking exemption 5 would appear to be inappropriate, since such records are not properly subject to that exemption.

Conclusion

NRDC respectfully requests that CEQ grant this appeal and complete the processing of this request within 20 working days. If you would like to discuss any aspect of this letter, please do not hesitate to call me at (202) 289-2419.

Sincerely,



Jeff Fiedler

Climate Policy Specialist

¹ Rather than repeat it here, we respectfully draw your attention to the first full paragraph of page 2 of our April 27 letter, which defines the scope of the term "record" for purposes of this request.